NO. 49433-7-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

RODNEY RICH and SANDRA RICH,

Appellants,

vs.

ERIC O. RASMUSSEN, M.D. and JANICE M. RASMUSSEN,

Respondents.

OPENING BRIEF OF APPELLANTS RODNEY AND SANDRA RICH

Averil Rothrock, WSBA #24248
Email: arothrock@schwabe.com
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Tel: 206.622.1711
Fax: 206.292.0460

Dennis D. Reynolds, WSBA #04762
Email: dennis@ddrlaw.com
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge, WA 98110
Tel: 206.780.6777

Attorneys for Appellants, Rodney Rich and Sandra Rich

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I. INTRODUCTION

Appellants Rodney and Sandra Rich appeal a summary judgment denying their defenses to a quiet title action. The Riches' defenses have merit and should proceed to trial.

The Riches own a residence on Bainbridge Island. Their neighbors to the north, the Rasmussens, sued to quiet title along the shared boundary line. In defense, the Riches claimed title to disputed portions based on, among other assertions, mutual recognition and acquiescence to an agreed boundary for over ten years, known as a claim for "mutual acquiescence."

According to testimony submitted by the Riches, the Riches and the Rasmussens orally and expressly agreed to a boundary line based upon certain physical structures in place in 1993. The Rasmussens recognized these designations for years and watched – and even assisted – the Riches make significant and costly improvements according to these physical designations, only to obtain a survey in 2013 and allege encroachments. The testimony viewed favorably to the Riches supports the three elements of mutual acquiescence: (1) a boundary line "certain, well defined and in some fashion physically designated upon the ground;" (2) manifestation of good faith mutual recognition of the designated boundary line; and (3) mutual recognition for ten years. Indeed, a major portion of the agreed line is conceded, as further set out below.

The evidence also supports the Riches' alternative defenses of equitable estoppel and laches.

The Superior Court precipitously rejected the Riches' defenses on summary judgment despite adequate testimonial support. Summary judgment was legal error.

II. ASSIGNMENT OF ERROR TO SUMMARY JUDGMENT

The Superior Court erred as a matter of law when it granted summary judgment to the Rasmussens (CP 454-56) despite sufficient evidence of (1) more than ten years of mutual acquiescence in a physically designated boundary expressly and orally agreed upon, and (2) circumstances supporting equitable estoppel and laches.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the Riches present adequate evidence to support their claim of mutual acquiescence to survive summary judgment?

2. Did the Riches present adequate evidence to support their claims of estoppel and laches to survive summary judgment?

IV. STATEMENT OF THE CASE

Rodney and Sandra Rich bought property on Bainbridge Island in 1993. CP 75:11-12. This property looks out across Puget Sound. A steep cliff descends to the waterfront edge of the property along its west side. CP 79:16-18. For many years the cliff was not landscaped and was covered

with blackberries, ivy, "volunteer" plants, and other vegetation. CP 80.

A. Neighbors Rodney Rich and Eric Rasmussen in 1993 Expressly Agreed to the Boundary Between Their Properties.

Just after the Riches purchased their property, Rodney Rich and Eric Rasmussen discussed and agreed in 1993 to physical designations of their shared boundary line. CP 381-82; CP 75-78.

Regarding the upper portions of their properties between their actual residences, Rodney testified that in 1993 Eric and he agreed upon the line and then that year Rodney built a concrete retaining wall consistent with that oral agreement. CP 381-82, ¶ 6; CP 74:2-22; CP 249:4-250:24. The concrete wall extends for just under 100 feet on this level portion of ground. *See* CP 152 (survey). Rodney and Eric agreed to place the wall more on the Riches' property so as not to disturb a mature laurel hedge, and agreed the concrete wall would mark the new boundary to the detriment of the Riches. CP 249:4-250:24.

Eric confirms this agreement. CP 293:21-296:1 (answering affirmatively that the 1993 conversation regarding placement of the concrete wall created in Eric's mind an agreement that the upper property line would be the concrete wall). The parties thereafter maintained their respective properties up to the concrete wall. CP 382 ¶ 7. This is not disputed.

On that same day, Rodney and Eric further orally agreed that the common boundary would extend from the end of this concrete wall down the parties' steep banks, which were not well suited to a wall or fence, to the south edge of the Rasmussens' waterfront deck. CP 382 ¶ 8, CP 75:22-78:17; CP 249:4-251:9. This portion of the properties runs approximately 74' to each party's bulkhead at the water's edge. *See* CP 152 (survey). According to the testimony of Rodney, Rodney and Eric stood on the beach and looked at the steep bank and agreed that the boundary would extend from the end of the planned concrete wall to the south edge of the Rasmussens' deck. *Id.*

Rodney's testimony about the express agreement regarding the shared boundary line down the cliff to the beach includes the following:

> Q: What do you recall of that conversation?
>
> A: We went down below, and as I had done with the Sciaccas and all other neighbors in the past, I asked where the property line was, and he [Eric Rasmussen] told me he did not know exactly where it was. It had not been surveyed, or he had not had it surveyed, but he believed that it was at the end of his deck. And we agreed upon that fact.

CP 76:6-14.

> A: He thought it was at the end of the deck. He did not know exactly—I will retract that. He did not say near the deck. We assumed that it was near the deck, but we agreed that it would be at the end of the deck.

CP 77:4-8.

Q: So did you believe you had reached some sort of formal agreement with Dr. Rasmussen?

A: Yes.

Q: And how did you document that agreement?

A: A man's word is his bond.

CP 78:15-19.

Rodney further testified that when Rodney and Eric reached the oral agreement in 1993, they discussed the possibility of a survey and rejected the need for one. CP 238:1-3 ("We decided we did not need to do one."); CP 261:16-21 ("Well, Eric and I discussed whether or not we needed to do a survey back in '93, and we agreed that we didn't need to. We agreed on where the delineation of the property was, and that was it."); CP 382 ¶ 8 ("I asked him [Eric] if he thought we needed a survey and he said 'no.'").

Testimony of neighbors Raquer, Hammel and Sciacca established that Rodney routinely consulted with his neighbors about the location of shared boundary lines before building any improvements or working on the Riches' property. CP 374 ¶ 6 (testimony of Raquer) ("Defendant Rodney Rich always asked for my permission to perform work between our properties."); CP 334 ¶ 8 (testimony of Hammel) ("Prior to any work on his property, Rodney Rich approached me and together we established where the property line was on our properties. Subsequently, I maintained my side

and the Riches maintained their side."); CP 409 ¶ 8 (same testimony of Sciacca). *See also* CP 384 ¶ 11 (testimony of Rodney re: same).

The designation of the corner of the Rasmussens' deck as a boundary marker is consistent with the undisputed placement of a bulkhead by the Riches' predecessor Michael Hayden in late 1987. CP 380 ¶ 5:8-14, CP 386 ¶ 16 (Rodney's testimony); CP 286-87 (Eric's testimony). Mr. Hayden obtained a permit identifying a proposed bulkhead "in front of his property" on Lot 19 (CP 344, 347, 349, 351), which bulkhead tied into the Rasmussens' bulkhead on which their deck sits. CP 339-40 ¶¶ 7-12 (testimony of predecessor Hayden). The corner of the Rasmussens' deck ends where the Hayden (now Rich) bulkhead begins. *See* CP 152 (survey indicating "Wood deck").[1] This marks a natural and undisputed boundary in place since 1987 that Rodney and Eric expressly acknowledged in 1993.

Thus, the parties designated the entire shared boundary line from Sunset Avenue to the bulkheads. *See* CP 152, 40. The parties delineated over 60% of that line by a concrete wall, and, where a wall was not feasible due to the topography, the remaining 38% or so by prominent, fixed features consistent with the location of their bulkheads that had

[1] CP 59 contains an enlarged image of CP 152 prominently showing the Rasmussens' wood deck.

existed since at least 1987.

B. For More Than Twenty Years, the Parties Observed the Boundary.

Subsequent to 1993, and until the Rasmussens obtained the survey in 2013, the parties observed the designated boundary. They maintained their respective properties up to the agreed line, including maintaining the vegetation up to the boundary. CP 228:21-229:3, 243:16-19, 247:12-248:5, 267:5-15 (Rodney's testimony that parties maintained their properties up to agreed line); CP 274:2-6 (Sandra Rich's testimony that parties maintained properties up to agreed line).

Additionally, the Riches placed a bright white tight-line (although they had ordered black) a few feet to their side of the agreed line in 1994, where it has remained (twice being replaced in 2007 and 2010) consistent with the agreed boundary. CP 382-83 ¶¶ 8, 9; CP 224:14-226:2, 255:10-260:9; CP 266-67 (testimony of Rodney re: white tight-line installed in spring 1994 and very visible for first year and half). *See also* CP 275:25-277:6 (testimony of Sandra Rich re: agreed line and tight-line); CP 325:11-17 (testimony of Eric re: tight-line). The tight-line was always and remains just south of the agreed line. *Id.*

On one occasion, the Rasmussens' gardeners placed cut trees and bushes on property that the Rasmussens now claim they own but which was on the Riches' side of the agreed boundary, resulting in an apology

from the Rasmussens to the Riches. CP 274:11-275:16 (Sandra Rich testimony re: Eric's apology about yard debris placed on Riches' side of agreed line).

At all times after the 1993 conversation, Rodney ensured that his improvements did not cross the line. CP 199:9-25; 210:4-18. To make sure this work conformed to his agreement with Eric when precision was necessary, Rodney at times used a string "as a reference point" between the two agreed upon points. CP 384 ¶ 11:21-24; CP 96-97, 100-01; CP 212:11-213:21 (including at 212:19, "It [nylon masonry line] was attached at the wall at the top where we had agreed the property line was, and it went down to the end of his deck, where we agreed the property line was."); CP 254:17-19 ("I told you we pulled a line. I moved the wall on our side to make sure I wasn't on the Rasmussens' property.").

Eric confirmed that he was aware of this and agreed to it. CP 317:24-318:7, 320:2-6. He testified, "When he [Rodney] was starting [work on the terraces in 2007], about that time, he said, do you think I ought to shoot a line? And I said, well, if you can be within one foot of the property line, like we are at the top, I'm okay with that." CP 317:24-318:3.

Over the last twenty years, the Riches made improvements on their side of the agreed line, including landscaping (CP 81-84), installing stairs

in 2001 or 2002 (CP 199:2-25, 200:5-10), beginning the terracing in 2007 (CP 81-83), erecting a concrete and stone wall at the bottom of the bank along the waterfront in 2008 or 2009 (CP 86-87), and working on their bulkhead. CP 244. The Rasmussens offered assistance with some of this work, including allowing the Riches to bring supplies down their stairs and allowing Rodney to use Eric's truck. CP 385 ¶ 12; CP 242:13-16. Eric testified similarly. CP 328:12-16, 329:1-8.

Both parties were concerned about stability of the cliff and thought the terraces would stabilize it, especially after a landslide occurred on the Riches' bank around 2000. *See* CP 122:12-17 (Rodney's testimony); CP 321:1-5 (Eric's testimony).

The Rasmussens rebuilt their waterfront deck—with Mr. Rich's help—in 2002-03 in its same location that conformed to the understanding that the convergence of the two bulkheads (where the corner of the deck is located) marked the property line. CP 387 ¶ 17, CP 208:18-209:4, CP 268-269:5 (Rodney's testimony); CP 329:9-17 (Eric's testimony).

C. The Riches Undertook Significant and Costly Improvements Conforming to the Boundary Without Objection from the Rasmussens.

The terrace work culminated in 2013 when the top terrace was completed. CP 284-85. *See also* CP 148 (topography map). Although the top terrace does not encroach (*see* CP 152, 148), the Rasmussens disliked

its location adjacent to and level with their property. CP 385, 309:19-23, 312:12-313:24. Over the preceding years, the Rasmussens frequently had observed and discussed Rodney's work on the steep bank with him. CP 385 ¶ 12. The Rasmussens were clearly aware of the work as it progressed, as this deposition answer shows:

> Q: When Mr. Rich was constructing the terrace work, I take it, over the period of time you were there and obviously observed the work occur, is that right?
>
> A: That's correct.
>
> Q: And you said you didn't make objection until—if I recall your testimony, until this very top terrace was constructed, is that correct?
>
> A: Correct.

CP 308:4-12. The Rasmussens admit they never objected to the terraces over all of this time, as Eric testified:

> Q: I'm talking about the entire terracing. Did you have objections to any of the location of the terraces at the time they were constructed? Yes or no.
>
> A: No.

CP 321:12-16. *See also* CP 385 ¶ 12 (Rasmussens had commented in friendly ways over the years about the terracing work). The Rasmussens passed endless opportunities to raise concerns because the neighbors spent time together and were very social with each other. CP 287:18-293:4 (Eric's testimony regarding friendship and his awareness over the years of

the construction of the terraces).

By 2013, the Riches had relied on the Rasmussens' express agreement, their conformity with that agreement, and their lack of objection to the work over many years (far in excess of ten) to expend an estimated $250,000 on the improvements. CP 385 ¶ 13.

D. After Observing for Years the Riches' Improvements Without Objection, the Rasmussens Obtained a Survey in 2013 and Asserted Encroachments.

Long after they had observed and even assisted the Riches with improvements that conformed to the designated boundary line, the Rasmussens obtained a survey in 2013. CP 149-50 (surveyor's testimony). The survey revealed that some of the Riches' improvements—in particular those toward the bottom of the cliff including the stairs constructed in 2001/2002 and the lower terraces on which construction began in 2007—encroached on the Rasmussens' property. CP 150 ¶ 5. *See also* CP 5 ¶ 3.9 (Complaint); CP 148 (topography map). Regretfully, the Rasmussens recanted their agreement and initiated this action in June 2015. CP 3.

E. The Superior Court Granted Summary Judgment Quieting Title in the Rasmussens and Dismissing the Riches' Defensive Claims of Mutual Acquiescence, Estoppel and Laches.

The Rasmussens sued seeking to quiet title according to the 2013 survey. The Riches defended on the theory of mutual acquiescence, CP

24-27, and also asserted estoppel and laches. CP 18 ¶ 2.2. The Rasmussens moved for summary judgment. CP 48-66 (Motion); CP 412-28 (Reply). The Riches opposed judgment (CP 162-81 (Opposition)) and submitted extensive evidence.[2] The Superior Court held oral argument. VR 1-28 (8/12/16 transcript). The Court granted summary judgment on August 22, 2016. CP 454-56.

V. ARGUMENT FOR REVERSAL OF SUMMARY JUDGMENT AND REMAND FOR TRIAL

The law does not support the summary judgment to the Rasmussens. The Riches offered sufficient testimonial evidence to satisfy all the elements of mutual acquiescence, estoppel and laches. The Superior Court either viewed the evidence too narrowly, or viewed the law too restrictively. The evidence viewed favorably to the Riches supports the required elements and warranted a trial.

A. Standards of Review Are *De Novo.*

This Court reviews the summary judgment *de novo*. *See Folsom v. Burger King*, 135 Wn.2d 658 (1998) (summary judgment orders are reviewed *de novo*). "In analyzing orders on summary judgment, this court

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[2] The included testimony from Rodney Rich (CP 379-88, CP 187-269), Sandra Rich (CP 273-78), Eric Rasmussen (CP 282-331), neighbor Tom Hammel (CP 333-35), predecessor Michael Hayden (CP 338-41), neighbor Joseph Raquer (CP 373-74), neighbor Leo Schilling (CP 401-04), neighbor Michael Sciacca (CP 407-09).

has traditionally noted that a moving party under CR 56 bears the initial burden of demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Schaaf v. Highfield*, 127 Wn.2d 17, 21 (1995). A court "must consider the facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982). "The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Id.*

The Court also determines *de novo* the legal effect of the evidence, i.e., whether the line established by the evidence is "certain, well defined and in some fashion physically demarcated upon the ground." *Lilly v. Lynch*, 88 Wn. App. 306, 316 (1997). Thus, this Court decides anew whether the evidence and inferences in the Riches' favor support the elements of mutual acquiescence.

In applying these standards favorable to the appellants, this Court should reverse.

B. The Riches Presented Sufficient Evidence to Warrant a Trial of Their Defensive Claim of Mutual Acquiescence.

The Superior Court erred when it dismissed the Riches' defensive claim of mutual acquiescence. Ample evidence warranted a trial.

1. The Riches presented sufficient evidence of each element of mutual acquiescence.

The Riches presented evidence that, if believed, would satisfy all three elements of mutual acquiescence. A claim of mutual acquiescence requires proof by clear, cogent and convincing evidence:

> (1) that the boundary line between two properties was "certain, well defined, and in some fashion physically designated upon the ground, *e.g.*, by monuments, roadways, fence lines, etc."; (2) that the adjoining landowners, in the absence of an express boundary line agreement, manifested in good faith a mutual recognition of the designated boundary line as the true line; and (3) that mutual recognition of the boundary line continued for the period of time necessary to establish adverse possession (10 years).

Merriman v. Cokeley, 168 Wn.2d 627, 630 (2010). "To meet this standard of proof, the evidence must show the ultimate facts to be highly probable." *Id.* at 630-31. The testimony and evidence submitted by the Riches meets this standard of proof and satisfies the elements.

a. A sufficient boundary line exists.

The evidence shows that the parties designated a line along their shared property border that ran the length of the concrete wall installed by Rodney in 1993 and traversed the steep cliff from the end of that wall to the corner of the Rasmussens' deck. This evidence, if believed, is legally sufficient to prove an object or combination of objects that clearly divides the two parcels. Over 60% of the line consists of a concrete wall and the remaining boundary that traverses a steep cliff consists of a combination

of two, above-ground and prominent objects: the end of the concrete wall and the corner of the Rasmussens' deck. These two objects divide the cliff, which is not suited to a wall or fence. For more than twenty years, this combination of objects has clearly divided the two parcels along with the concrete wall.

In *Merriman*, ground-level survey stakes "became overgrown with blackberry bushes, weeds, and ivy" and were not visible. 168 Wn.2d at 631. The Court held these "widely spaced markers... set in a thicket of blackberry bushes, ivy and weeds" "did not constitute a clear and well-defined boundary line." *Id.* The current facts are distinguishable. Along the top of the properties, the parties used a concrete wall to mark the boundary. At the cliff, where continuing the wall was impracticable, the parties identified two prominent objects. These physical designations have remained visible from 1993 to the present. They are clear and well-defined. The wall and deck corner are not like the buried survey stakes in the *Merriman* case.

Washington case law recognizes that suitable boundary markers do not have to be continuous or connected. In *Spath v. Larsen*, 20 Wn.2d 500 (1944), the court recognized that a line of stakes may be sufficient evidence of a boundary. The defendant asserted both adverse possession and mutual acquiescence claims with reference to "a line of stakes driven

into the ground." 20 Wn.2d at 503. The Superior Court denied the claims because it found the defendant failed to prove the existence of the line of stakes. *Id.* at 505. That a plaintiff need not show a continuous or connected line, i.e., a fence of some type, is also shown by the plain language in *Merriman*, which requires only a physical designation upon the ground that can include "objects" used in "combination." The law allows a boundary line that consists of two fixed and prominent points. The law does not establish a minimum distance between two points. Here, the agreement between Rodney and Eric was appropriate for the topography and vegetation of their parcels. The prominent objects selected by the parties were suitable in these circumstances. They were certain and well defined.

It makes sense that the parties selected two visible, above-ground markers to designate the boundary down the steep bank. It also makes sense that they selected the corner of the Rasmussens' deck, because this is where the Riches' predecessor had installed a bulkhead to meet up with the Rasmussens' bulkhead (where their deck sits). CP 380 ¶ 5:8-14, CP 386 ¶ 16, CP 286-87, CP 344, CP 347, CP 349, CP 351, CP 339-40 ¶¶ 7-12, CP 152 (survey indicating "Wood deck"). As Rodney testified, when precision was necessary to pinpoint where to install the terraces, the designated markers allowed him to use a string stretched between the two

points to confirm he did not cross the boundary. CP 384 ¶ 11:21-24; CP 96-97, 100-01; CP 212:11-213:21. Eric confirmed that he was aware of this. CP 317:24-318:7 ("When he [Rodney] was starting [work on the terraces in 2007] he said, do you think I ought to shoot a line? And I said, well, if you can be within one foot of the property line, like we are at the top, I'm okay with that."); CP 320:2-6 (same).

Lloyd v. Montecucco, 83 Wn. App. 846 (1996), strongly supports reversal based on these facts. *Lloyd* similarly concerned two adjoining waterfront lots. One family built a bulkhead "to protect their steep bank from erosion." *Id.* at 849. They also built a cyclone fence across the top part of their property, ending at a bluff that descends steeply to the water. *Id.* Their neighbor was aware of the construction of the bulkhead below and the cyclone fence above, and that the family maintained their property "around the fence to the edge of the bluff and down the steep bank to the bulkhead." *Id.* at 849-50. These facts are exceedingly similar to the present dispute, although they lack an express agreement like the one between Rodney and Eric.

In *Lloyd*, this Court approved recognizing the projection of the line from the end of the fence down the steep bank to the bulkhead as the boundary line for the adverse possession claim, stating that courts may "project boundary lines between objects when reasonable and logical to do

so." *Lloyd*, 83 Wn. App. at 853-54.[3] With some prescience, the Court observed that lines can be projected on "a steep bank and wooded area" that otherwise do not "easily permit a clear demarcation." *Id.* at 854. The Court affirmed the adverse possession award because the testimony showed that one party had maintained the wooded area "between the fence and the bulkhead." *Id.* ("Based upon Shoblom's testimony that he knew the Lloyds maintained the wooded area between the fence and the bulkhead, based upon the Montecuccos planting and harvesting of trees, and considering the area was heavily wooded and steep, the trial court did not err in drawing a straight line between the outside perimeter of the northwest corner of the fence and the northern edge of the bulkhead.").

This common sense approach in the adverse possession context supports the boundary line shown by the Riches to support their mutual acquiescence claim. The Riches and the Rasmussens agreed to a reasonable and clear boundary line, using a concrete wall for 60% of that line and then projecting the line from one fixed and visible object to another fixed and visible object on steep topography covered by native vegetation. This was a feasible means of demarcation. The evidence

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[3] The Riches chose not to claim adverse possession against the Rasmussens because they disliked the hostility inferred from that claim. *See* CP 163:1-3 ("They [the Riches] never sought to be adverse or hostile."), 558:20-559:9.

shows the two objects were so certain and well defined that all of the Riches' improvements precisely observe it.

Lloyd further demonstrates that the Riches' claim is sufficient for trial because the Riches rely on fixed objects. In *Lloyd*, the family that prevailed on its adverse possession claims as to the upper portion of its lot also alleged mutual acquiescence to claim tidelands. This Court affirmed rejection of that claim, reasoning that the element of a sufficient boundary line was unmet because the family could point only to errant concrete blocks in tidelands that tidal action moved. 83 Wn. App. at 855-56. Unlike those concrete blocks whose position changed in *Lloyd*, the fixed points designated by the Riches and Rasmussens are not changeable. The end of the concrete wall and the end of the deck do not fluctuate like the markers rejected in *Lloyd*.

The Riches have supported their claim of mutual acquiescence because, if Rodney's testimony is believed at trial, the parties expressly agreed to clearly visible and prominent objects to designate the boundary along their shared property line. This was legally sufficient to support the mutual acquiescence claim.

Rodney's testimony is supported by his own testimony and the testimony of his neighbors that Rodney routinely consulted with his neighbors on the boundary lines before working on his property. He had

conversations with Mr. Raquer (CP 374 ¶ 6), Mr. Sciacca (CP 408 ¶ 8) and Mr. Hammel (CP 334 ¶ 8) that were similar to his conversations with Eric. CP 384 ¶ 11. Further, Eric concedes an agreement was reached as to the majority of the property line where the concrete wall was built on the level ground. CP 293:21-296:1. He acknowledges a conversation on that same day about the cliff, although he does not feel he and Rodney agreed to the boundary. CP 296:23-298:16. Eric acknowledges that he later acquiesced to Rodney's work along the cliff on the basis that Rodney could "shoot a line" to identify the boundary between the markers that he and Rodney had identified (CP 317:24-318:7, 320:2-6). The testimony was adequate to require a trial.

b. The parties manifested good faith mutual recognition of that designated boundary line.

In this case, a strong record exists of manifestations recognizing the designated boundary line. First, as already discussed, a trier of fact could find that an express oral agreement was reached regarding the entire boundary line when the Riches purchased their property in 1993. The existence of an express agreement is not a requirement for a mutual acquiescence claim, *see Lamm v. McTighe*, 72 Wn.2d 587, 593 (1967), showing that the evidence in support of this claim exceeds the minimum showing. These conversations evidence good faith mutual recognition of the designated boundary line.

Second, the actions of the parties cannot be recanted. Since 1993 the parties continued to recognize the line through actions and additional conversation. As documented in IV.B., *supra*, they each cut their vegetation up to the agreed line, the Riches placed a tight-line on their side of that line in 1994 that has remained there, the Riches installed landscaping on their side, the Rasmussens apologized when significant yard waste was placed on the Riches' side of that line, the Riches installed stairs on their hillside in 2001/2002, and the Riches in 2007 began terraces set just back from that line. For the next six years, Rodney installed more and more terraces up to the line without objection from the Rasmussens. The Rasmussens rebuilt their deck in the same position it always had occupied, serving as the southern marker of their property up to the Riches' bulkhead.

Third, most convincing, for all the years that the terracing progressed before his eyes, Eric testified that he made no objection to the location of the terraces or the stairs constructed in 2001. CP 308, 321. The Rasmussens made friendly comments about the work and at times offered assistance. CP 385 ¶ 12, 242:13-16.

This evidence amply supports the second element. The doctrine of mutual acquiescence is "founded upon the truism that actions are often, if not always, stronger talismans of intentions and beliefs than words." *Lamm*, 72 Wn.2d at 593. The Supreme Court has further stressed that

"acts and conduct of the parties, carried on over a long period of time, give rise to an implied agreement fixing the location of the common boundary between their properties, ergo, the statute of frauds is not involved since the purpose is to fix the identity of the respective properties rather than to transfer ownership." *Id.* Here, the actions of the parties combine with their express agreements to present a compelling case consistent with the principles of the doctrine.

The Riches' evidence of acquiescence is much stronger than the evidence of acquiescence in *Merriman*. These circumstances strengthen the conclusion that the parties' designation of objects was sufficient for their needs and suited their uses of the properties.

c. Mutual recognition persisted for more than ten years.

The acts of mutual recognition persisted for more than ten years. As already shown, the conversation between Rodney and Eric establishing the boundary line occurred in late 1993, twenty years before this dispute. After this initial conversation, no party ever revoked or disclaimed that understanding until the 2013 survey was obtained. The parties maintained the vegetation on their sides of the lines, with the Rasmussens apologizing when their gardeners placed dead trees and bushes on the Riches' side. The Riches in 1994 carefully placed the white and visible tight-line just to the south of the designated boundary where it has remained. The Riches

landscaped and in 2001/2002 installed stairs. In 2007 Rodney began installing the terraces, beginning with those farthest down the cliff. All of these actions took place within the area that the Rasmussens now claim. The parties acted on their understanding for essentially twenty years. Not until 2013 when the Rasmussens became displeased with the final terrace installed at the top of the bank – which does not encroach – did the Rasmussens voice disagreement.

In *Lamm*, the Supreme Court affirmed the Superior Court's judgment of mutual acquiescence, noting that the complaining party "passively observed their neighbors' acts of dominion in relation to the now disputed strip, and made no overt claim to any property lying westerly of the fence line until an exchange of words gave rise to a dispute and the 1963 survey." 72 Wn.2d at 594. Similarly, without regard to the 1993 oral agreement, at the very least the Rasmussens "passively observed" the Riches' acts of dominion for years but waited until long after the ten-year period passed before obtaining a survey.

The evidence satisfies the requirement of a ten-year period.

2. Summary judgment rulings in mutual acquiescence cases are readily overturned.

Not surprisingly, mutual acquiescence cases often turn on careful weighing of the evidence not amenable to summary judgment. This principle applies to the Riches' claims.

For example, in *Lilly v. Lynch*, *supra*, the Court reversed a summary judgment and remanded for trial a mutual acquiescence claim, concluding that issues of fact required a trial.

In contrast, in *Lamm v. McTighe*, the court affirmed a verdict after a bench trial in favor of the party claiming mutual acquiescence. 72 Wn.2d at 594. Similarly, in *Merriman*, *supra*, the Supreme Court reinstated the Superior Court's judgment based on the findings resulting from a trial, noting that a reviewing court may not disturb findings of fact supported by substantial evidence "even if there is conflicting evidence." 168 Wn.2d at 631.

Here, the Rasmussens presented sufficient evidence. The evidence would support findings favorable to the Riches, entitling them to judgment. This Court should reverse and allow the mutual acquiescence claim to proceed to trial.

C. The Riches Presented Sufficient Evidence to Warrant a Decision on the Merits of Their Defenses of Laches and Equitable Estoppel.

The Riches offered sufficient evidence to support application of equitable estoppel and laches to avoid entry of relief in favor of the Rasmussens. The Superior Court should have considered these equitable defenses on their merits. The Rasmussens slept on their rights. They knew that they had agreed to a boundary line without the benefit of a

survey, or at the least had significant conversations regarding the boundary that had caused the Riches to move forward making extensive improvements on the steep bank. For years the Rasmussens observed these improvements but said nothing to question their location or scope. Their current objections come too late. Adequate evidence required the Superior Court to address these defenses at a trial.

1. The Riches presented sufficient evidence of each element of equitable estoppel.

The Riches asserted that equitable estoppel prevented the Rasmussens from prevailing on their claims by repudiating their prior oral agreement to the boundary line and their lack of objection to the improvements on the bank. *See* CP 178-79. The Riches presented ample evidence.

The record supports the three elements of equitable estoppel, which are: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *Thomas v. Harlan*, 27 Wn.2d 512, 518 (1947). The Supreme Court has recognized equitable estoppel as a doctrine available to establish a boundary between adjoining properties "at odds with the true boundary as revealed by subsequent survey...." *Lamm*, *supra*, 72 Wn.2d at

591. *See also Thomas*, 27 Wn.2d at 518, citing *Tyree v. Gosa*, 11 Wn.2d 572 (1941) (doctrine of equitable estoppel can apply to property titles).

The doctrine of equitable estoppel prevents a person from "wrongfully or negligently by his acts or representations caus[ing] another who has a right to rely upon such acts or representations to change his condition, to his detriment or prejudice." *Kessinger v. Anderson*, 31 Wn.2d 157, 169 (1948). The doctrine prohibits that party from "pleading the falsity of his acts or representations for his own advantage, or from asserting a right which he otherwise might have had." *Id.* These principles support the doctrine's application here if considered on the merits.

The Rasmussens' statements and acts from 1993 to 2013 are inconsistent with their lawsuit to quiet title in their favor and force the Riches to remove the improvements at great expense. Rodney testified that he relied on the conduct of the Rasmussens both in agreeing to the boundary line without a survey and in assisting and observing the work without objection, or Rodney would not have constructed the improvements and spent $250,000. CP 385 ¶¶ 12-13. This is especially believable given the testimony that Rodney behaved this way with all his neighbors. Rodney's reliance was reasonable given the conversations about the boundary location and the express acknowledgment that a

survey was not necessary: Eric's acknowledgment that Rodney would "pull a line" to begin the terrace construction; the length of time; the obvious nature of the improvements; and the multiple opportunities that the Rasmussens let pass without raising a single concern about the location of the work. The Riches will be injured if required to remove the improvements at great expense, losing not only the value of the improvements but also having to incur the cost of removal. Removal may also destabilize the bank.

In the *Tyree v. Gosa* case, the Supreme Court rejected the equitable estoppel claim because the party asserting title to property on which others had constructed homes had protested the building of those homes "about as much and in the same manner as the standard prudent and reasonable man placed in his position might reasonably be expected to protest." 11 Wn.2d at 578. The landowner had informed the others that he believed they were building on his land. *Id.* The landowner also took no actions on which the others relied. *Id.* The others responded to his objections with the statement that they were "relying on the stakes set by their vendor." *Id.* at 577.

Unlike the facts in the *Tyree v. Gosa* case, here the Rasmussens made *no* protests to the Riches' substantial improvements from 2001/2002 when the stairs were put in until the terraces were completed in 2013.

Further, Eric assisted at times with those improvements and admired the work. The location of the work conformed to the express agreement with the Rasmussens about where the property line extended down the bank, and the conversation that they would dispense with a survey. The Riches reasonably relied on this conduct, which was a combination of affirmative acts and silence when the Rasmussens had a duty to speak.

This evidence, if believed at trial, would support equitable estoppel.

2. The Riches presented sufficient evidence of each element of laches.

The Riches also asserted laches to prevent summary judgment. CP 179. The Superior Court erroneously denied this defense in the summary judgment. Equity aids the vigilant, not those who slumber on their rights. *Arnold v. Melani*, 75 Wn.2d 143, 148 (1968). The Rasmussens slept on their rights.

The elements of laches are: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay. *Lopp v. Peninsula Sch. Dist.*, 90 Wn.2d 754, 769 (1978). "Laches in a general sense is the neglect, for an unreasonable length of time, under circumstances permitting diligence, to

do what in law should have been done." *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wash.2d 616, 628 (1945). A change in the condition or relation of the parties must accompany the delay and adversely affect the rights of the other party. *McKnight v. Basilides*, 19 Wn.2d 391, 400-01 (1943) (containing a summary of laches cases). Laches has been recognized, for example, where:

- Plaintiffs waited seven years to assert a claimed right in real estate, during which time they failed to perform their portion of an agreement relative to the property, and it had increased ten-fold in value (*Stewart v. Yesler Estate*, 46 Wash. 256 (1907));

- Claimant to property waited from 1888 until 1905 to prosecute an action for an interest in property, during which time title had been adjudged in another by the probate court, and claimant knew of the adverse possession and claim of ownership (*Little Bille v. Swanson*, 64 Wash. 650 (1911));

- An owner of an interest in a mining location waited ten years to assert his claim, knowing that a relocator who claimed the property was doing assessment work (*Harvey v. Laurier Mining Co.*, 106 Wash. 192 (1919)).

Id. at 401-02. In *Edison Oyster Co.*, the Supreme Court applied laches to prevent litigants from pursuing an action to recover oysters when they had waited nine years to pursue the oysters. *Id.* at 625-28. The oysters had drifted onto the tracts of neighboring properties and the litigants had been immediately aware of this. *Id.* at 625. The litigants observed the neighbors harvesting the oysters and selling them over several years after the loss, but failed to make any demand. *Id.* The Court held their

subsequent action was barred by laches. *Id.* at 628. These cases illustrate that laches applies in a real property context to prevent the assertion of rights neglected for an unreasonable length of time.

The record supported consideration of laches on the merits. Eric was aware of his conversations in 1993 with Rodney regarding the boundary line shared with the Riches, his rejection of the need for a survey, Rodney's effort to place the terraces according to a "pulled line" when he began the terraces in 2007, and the improvements the Riches constructed from 2001/2002 to 2013. The Rasmussens had an opportunity to obtain a survey from 1993 to 2013, but instead agreed to the boundary in 1993 and permitted Rodney to significantly improve the steep bank for nearly twenty years. Eric unreasonably delayed retracting his agreement and his dismissal of the need for a survey until after the Riches had gone to considerable expense over a long period of time. Removal of these improvements now would not only destroy their value, but would require significant additional expenditure for remediation. The record contains more than sufficient evidence to support laches.

The Rasmussens relied before the Superior Court on *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372 (1984), for the proposition that the defense of laches is not appropriate to bar an action "short of the applicable statute of limitations." *See* CP 421. This authority is not

applicable because no statute of limitations applies to a quiet title action. *Kent School District No. 415 v. Ladum*, 45 Wn. App. 854, 856 (1986) (reversing dismissal of quiet title action because "[t]here is no statute of limitations with regard to an action to quiet title."). A quiet title action, therefore, presents a suitable action for laches.

The Rasmussens argued to the Superior Court in their Reply that they "immediately" acted when the improvements reached the top of the bank. *See* CP 422. This argument is not compelling for multiple reasons. First, they did not support this argument in the record. (The Riches anticipate that the evidence at trial will show the Rasmussens delayed at least another six months before they raised an objection.) Second, the argument does not relate to the relief sought by the Rasmussens because the top terrace does not encroach. *See* CP 456 (injunctive relief requiring removal of all encroachments). Completion of the top terrace is irrelevant to the quiet title action because title undisputedly lies with the Riches. The argument also ignores years of work that preceded completion of the top terrace, including installation of the stairs in 2001/2002 and the lower terraces begun in 2007. At the very least, the Superior Court could decide on the merits that laches prevents relief as to these encroachments.

The principle from *Brost* is not applicable and the facts and circumstances belie summary judgment. The Riches submitted sufficient

evidence to require consideration on the merits whether equity supports a right to keep the improvements installed over multiple years in place.

VI. CONCLUSION

This Court should reverse the premature judgment to the Rasmussens and the dismissal of the Riches' claims and defenses on summary judgment, and remand the claims and defenses for trial. The evidence is legally sufficient. Fairness and the law require consideration of the claims and defenses at a trial on the merits.

DATED: December 29th, 2016

SCHWABE, WILLIAMSON & WYATT, P.C.

By: D Reynolds FOR

Averil Rothrock, WSBA #24248
Email: arothrock@schwabe.com
Attorneys for Appellants, Rodney Rich and Sandra Rich

BY email authority
dated 12/16/2016

DENNIS D. REYNOLDS LAW OFFICE

By:

Dennis D. Reynolds, WSBA #04762
Email: dennis@ddrlaw.com
Attorneys for Defendants, Rodney Rich and Sandra Rich

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein. I further certify that on this 29th day of December, 2016, I caused the document to which this certificate is attached to be delivered for filing as follows:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300, MS TB-06
Tacoma, WA 98402-4454
Via Court's JIS-Link Electronic Filing System

The original will be maintained in the files of the Dennis D. Reynolds Law Office.

I further certify that on this date, I caused a copy of the document to which this certificate is attached to be delivered to the following by e-mail:

Rob J. Crichton
Keller Rohrback LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Tel: 206-623-1900 / Fax: 206-623-3384
E-Mail: rcrichton@kellerrohrback.com

Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 29th day of December, 2016.

Jon Brenner, Paralegal

APPENDIX A

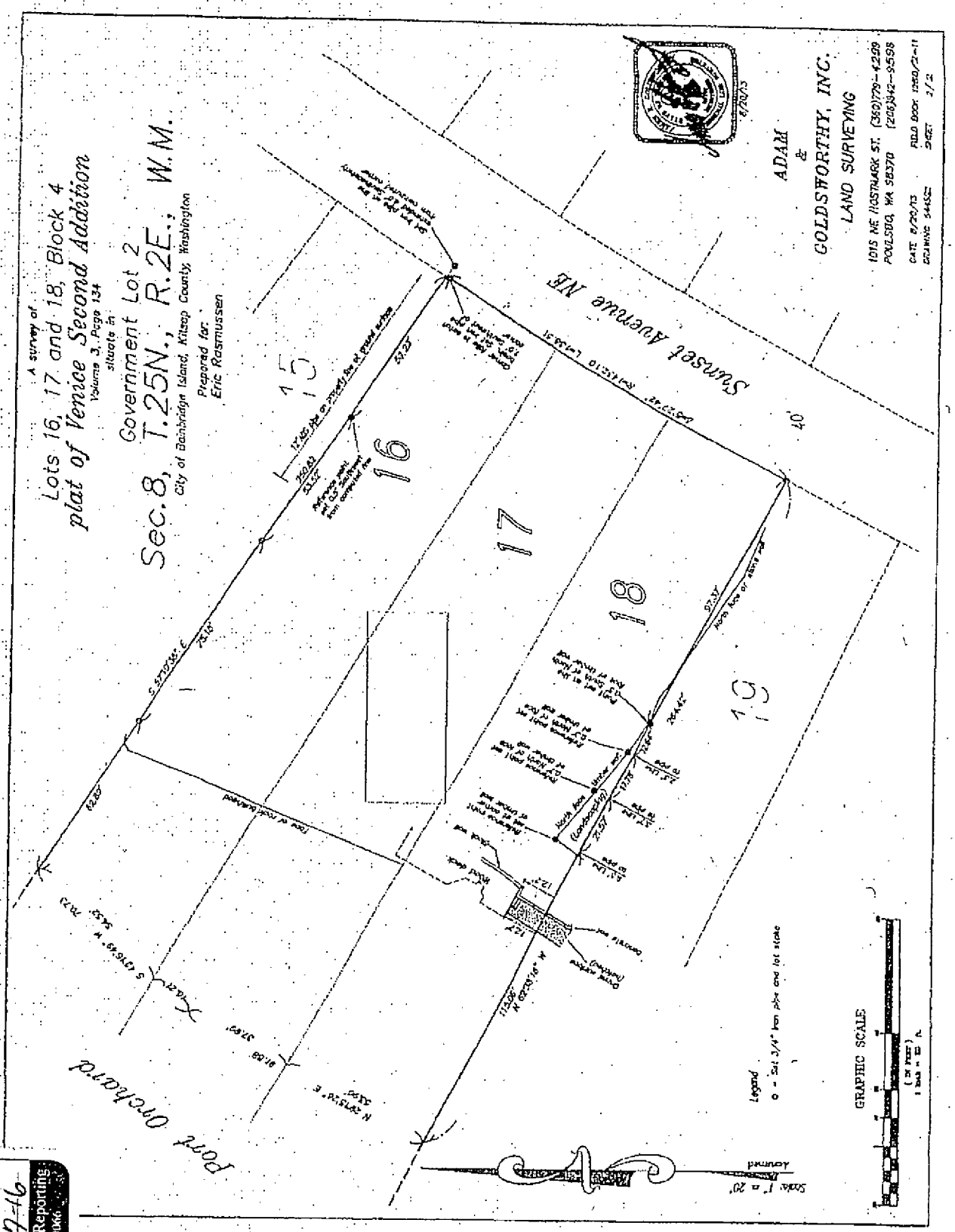
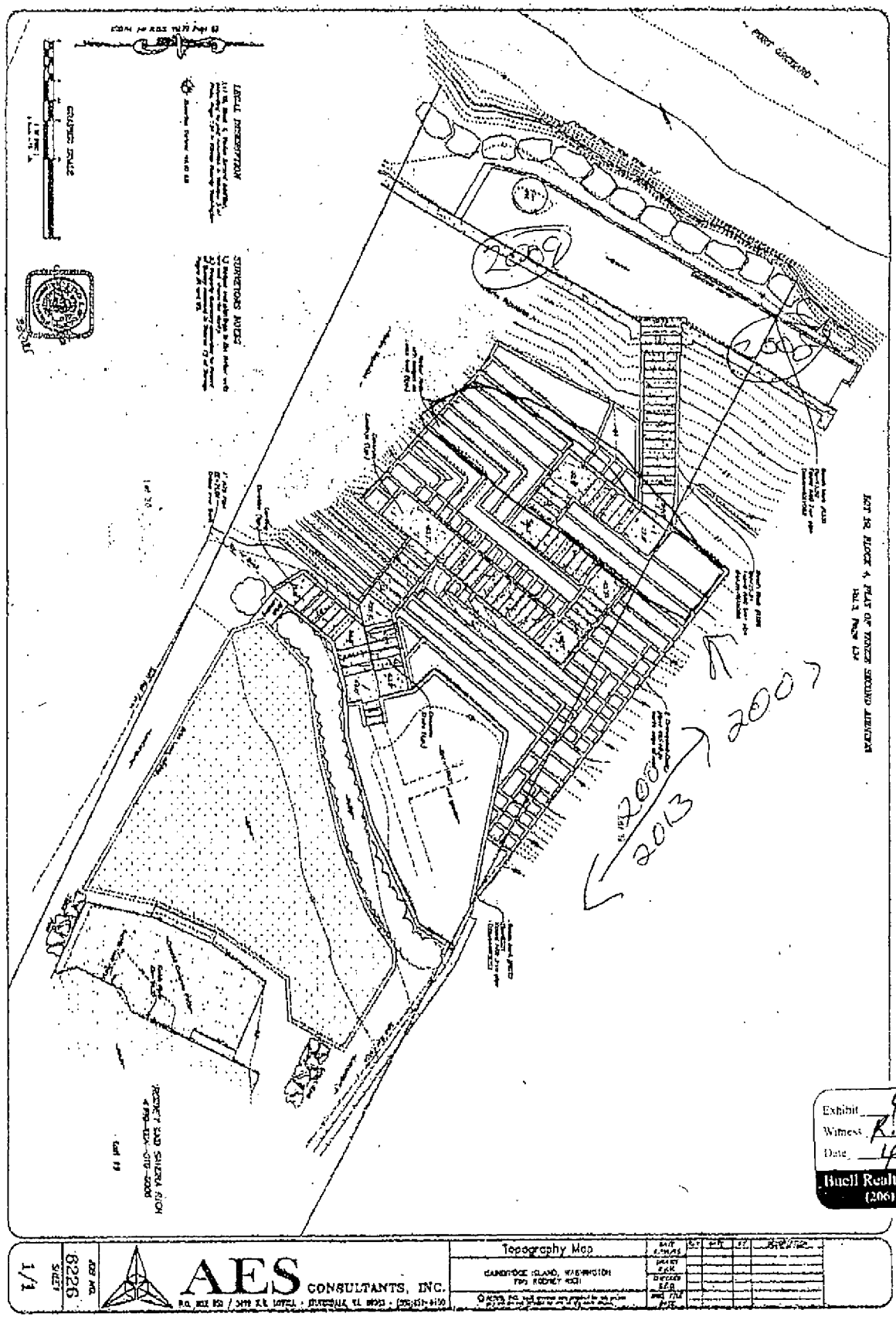


Exhibit
Witness R. Koch
Date 4-29-16
Buell Realtime Reporting
(206) 287-9066

APPENDIX B


Topography Map
AES CONSULTANTS, INC.
6226
1/1
Exhibit 4
Witness R. Rich
Date 4-27-16
Buell Realtime Reporting
(206) 287-9066

Appendix B

DENNIS D REYNOLDS LAW OFFICE

December 29, 2016 - 3:02 PM

Transmittal Letter

Document Uploaded: 4-494337-Appellants' Brief.pdf

Case Name: Rich v. Rasmussen
Court of Appeals Case Number: 49433-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

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rcrichton@kellerrohrback.com
dennis@ddrlaw.com
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